Supreme Court U. S.
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No. 80-519

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NELSON OIL COMPANY, INC.,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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OPPOSITION OF RESPONDENT SHELL OIL CO. TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court was divested of subject matter jurisdiction over an exclusively federal cause of action for violation of Department of Energy regulations by the remand to state court of a separate and distinct action which included a counterclaim raising similar claims.

2. Whether both the district court and the Temporary Emergency Court of Appeals erred in interpreting and applying the plain language of 10 C.F.R. § 211.13(f), without deferring to the primary jurisdiction of the Department of Energy.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on July 21, 1980. (App. A.)[1] A petition for rehearing was denied on September 9, 1980. (App. B.) The petition for a writ of certiorari was re-

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[1] References to "App." indicate the Appendix to Petition for Writ of Certiorari. References to "Pet." are to the Petition for Writ of Certiorari.

ceived by respondent on October 7, 1980. The jurisdiction of this Court is invoked under 15 U.S.C. § 745(a)(1), incorporating 12 U.S.C. § 1904 note.

STATEMENT

Nelson is an independent jobber of Shell branded gasoline in Banning, California. In September, 1978, Nelson filed a lawsuit against Shell and others in California state court alleging unfair competition, fraud and deceit. Shell removed the case to federal court, on the grounds of diversity of citizenship, alleging fraudulent joinder of parties. Following removal, Shell filed an answer and counterclaim based on Nelson's violation of regulations of the Department of Energy and its predecessors ("DOE"), specifically 10 C.F.R. § 211.13(f) which forbids the diversion of allocated gasoline to customers not specified in DOE assignment orders. (App. J.)

On Nelson's motion, the United States District Court for the Central District of California (Firth, J.) remanded the case to state court on December 27, 1978. (App. L.)[2] Shell, on February 20, 1979, filed a new complaint in the United States District Court for the Central District of California, which set forth claims similar to those in the counterclaim, *i.e.*, that Nelson had violated 10 C.F.R. § 211.13(f).

After trial on the merits, the district court (Real, J.) found that Nelson had engaged in "willful and blatant violations" of 10 C.F.R. § 211.13(f) and entered judgment awarding Shell $617,308.90 in damages, reducing Nelson's annual gasoline allocation by 17,935,929 gallons

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[2] Seven months later, on July 25, 1979, the Court issued a second order pursuant to Rule 60, Fed. R. Civ. P., stating that Shell's federal counterclaim had been remanded to state court as part of the earlier remand order. (App. M.)

and declaring that Shell had proper grounds to terminate Nelson's franchise under the Petroleum Marketing Practices Act (15 U.S.C. §§ 2801 *et seq.*). (App. C & D.)[3] Nelson appealed to the Temporary Emergency Court of Appeals ("TECA"), which unanimously affirmed the district court judgment, finding that "Nelson was not using the [DOE] regulations; it was abusing them." (App. 30A-31A.)

REASONS FOR DENYING THE PETITION

The petition raises no question of substantial importance deserving of this Court's attention. The decision below does not announce any new or major rule of law. It does not conflict with any precedent of this Court or TECA or with any DOE regulations or statutes. Indeed, Congress has provided for appeals to TECA from all cases arising under DOE regulations, thereby insuring uniform appellate interpretation of said regulations by a court with substantial expertise with respect thereto.

The frivolous nature of the instant petition is graphically illustrated by the fact that the principal argument in the petition, that relating to the jurisdictional effect of the remand order (Pet. at 7-19), was *not* raised as a question for review before TECA, but was relegated to a passing footnote reference in Nelson's appellate brief. Nelson thus seeks to invoke this Court's review of an issue which its counsel before TECA (who are not counsel on the instant petition) did not think merited appellate review. The instant petition is a patent attempt to delay further execution of the district court's judgment, which has been stayed pending appeal, and should be dismissed out of hand.

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[3] Nelson's appeal of the franchise termination ruling to the Ninth Circuit Court of Appeals is presently pending.

I. The District Court Properly Exercised Subject Matter Jurisdiction Over This Case.

Section 5(a)(1) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 754(a)(1), incorporates Sections 209 through 211 of the Economic Stabilization Act of 1970. Section 210(a) of the Economic Stabilization Act provides for a private right of action to enforce DOE statutes and regulations. (App. 2G.) Since Shell's complaint alleged injury based on Nelson's violation of the DOE regulations contained in 10 C.F.R. § 211.13(f), the complaint clearly satisfied the jurisdictional prerequisites contained in § 210.

Nelson's principal contention is that the order remanding Nelson's unfair competition action (and Shell's counterclaim) ousted the district court's jurisdiction over Shell's subsequent complaint. Nelson's argument, however, disregards § 211(a) of the Economic Stabilization Act (App. 4G.), which provides that the district courts . . . shall have *exclusive original jurisdiction* of cases or controversies arising under this title, or under regulations or orders issued thereunder . . . . (Emphasis added.)

Therefore, under the express terms of the statute, Shell's counterclaim, as well as its subsequent complaint, were within the exclusive jurisdiction of the federal courts. Since the state court had no jurisdiction over the counterclaim after remand, Shell's only recourse was to refile its claims in federal court. Plainly, the remand order did not confer jurisdiction on a state court over a claim which Congress has stated is within the exclusive jurisdiction of the federal courts.[4] It was specifically for

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[4] Contrary to Nelson's assertion, the district court in entering the remand order made no determination as to the appropriate forum for litigating Shell's claim of violation of the DOE regulations. It is well settled that, in deciding to remand a removed action, a district court may not consider matters raised by way of

this reason that TECA rejected Nelson's footnote argument:

> Nelson's argument that the district court did not have subject matter jurisdiction over Shell's claim because that claim was identical to the counterclaim remanded to the state court along with Nelson's unfair competition suit is wrong. Federal courts have exclusive jurisdiction over the claims raised by Shell [referring to prior footnote citing the Emergency Petroleum Allocation Act]. Because the state court is unable to consider Shell's counterclaim, it was appropriate for Shell to file an independent action in federal court following the remand in order to pursue its claim in the proper forum. (App. 16A.)

Nelson attempts to circumvent this unassailable conclusion with the frivolous argument that the state court had jurisdiction of Shell's counterclaim because § 211 of the Economic Stabilization Act provides for concurrent jurisdiction over DOE claims raised as a *defense* in a state action. The distinction between a defense, which is raised merely to defeat a plaintiff's cause of action, and a counterclaim, which seeks affirmative relief, is so well settled as to require no citation or further response to Nelson's contention.

II. The District Court and TECA Correctly Applied the Plain Language of 10 C.F.R. § 211.13(f) Without Deferring to the Primary Jurisdiction of DOE.

Both the district court and TECA rejected Nelson's attempt to invoke the doctrine of primary jurisdiction as a means of avoiding application of the plain language of 10 C.F.R. § 211.13(f) to its unlawful conduct.

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defense or counterclaim. *Gully* v. *First Nat. Bank in Meridian*, 299 U.S. 109, 112-13 (1936).

It is well settled that "No fixed formula exists for applying the doctrine of primary jurisdiction." *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 64 (1956). The application of primary jurisdiction depends on the circumstances of each case and whether the purpose behind the doctrine will be served by its application in that case. *Id.* Two major purposes of the doctrine have been identified: the need for the special expertise of the agency to decide technical questions and the interests of uniformity of regulation. *See, e.g., Far East Conference* v. *United States*, 342 U.S. 570, 574-75 (1952). Thus, the doctrine is generally served only in those "cases raising issues of fact not within the conventional experience of judges . . . ." *Id.* at 574.

The district court and TECA applied these principles in this case. (App. 15A-19A.) The purposes of the primary jurisdiction doctrine would not be served in this case "since the regulations . . . were clear," "[t]here was no question as to the validity or reasonableness of the regulations," and "[a]pplication of the regulation did not require the specialized expertise of the agency." (App. 18A.)

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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